Petition

81-1436

No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1981

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Petitioner,

vs.

EDWARD NEKOLNY and MARIA L. DAHMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Petitioner, in a suit alleging employment termination for exercise of Respondents' First Amendment right of political association, a violation of *Elrod* v. *Burns*, 427 U.S. 347, 49 L.Ed. 2d 547, 96 S.Ct. 2673 (1976), must carry the burden of *persuading* the fact finder, contrary to *Texas Community Affairs* v. *Burdine*, ... U.S. ....., 67 L.Ed.2d 207, 101 S.Ct. ..... (1981), that Respondents were terminated for legitimate reasons, after Respondents produce some evidence in support of their allegations.

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DECISIONS BELOW

The United States Court of Appeals for the Seventh Circuit denied the Petition for Rehearing and Rehearing *En Banc* on November 2, 1981. The decision is unreported. A copy of the order is found at Appendix, Page A-1a[1] The opinion of the Court of Appeals affirming the judgment of the District Court was entered on July 13, 1981 and is presently unreported. A copy of that opinion is found at Appendix, Page A-2a. The judgment order of the District Court for the Northern District of Illinois is found at Appendix, Page A-21a.

[1] "A" refers to the appendix to this Petition.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Petitioner,

vs.

EDWARD NEKOLNY and MARIA L. DAHMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

The Petitioner invokes this Court's jurisdiction under 28 U.S.C., Section 1254(1). The judgment of the United States Court of Appeals for the Seventh Circuit, denying the Petition for Rehearing or Rehearing *En Banc*, was entered on November 2, 1981, at a time not recorded. This Petition for Certiorari will be timely if filed by mail on or before January 31, 1982 without an extension.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution, which states:
   "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

2. The Fourteenth Amendment to the United States Constitution, which recites in pertinent part:
   ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Respondents, EDWARD NEKOLNY and MARIA L. DAHMS,[2] brought suit under 42 U.S.C., Section 1983 in United States District Court on February 13, 1978, against Petitioner, ANN B. PAINTER, individually, and as Supervisor of Lyons Township, Cook County, Illinois. The Complaint alleged that each of the Respondents was employed by Lyons Township, that each was dismissed from his or her employment by the Petitioner and, although the Petitioner had stated legitimate reasons for terminating the employment of each Respondent, the real reason for dismissal of each Respondent was that he or she had worked for Petitioner's opponent and against the Petitioner in the previous Township Election,

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[2] The third Plaintiff in the District Court proceeding, PATRICK DUMAS, is not a Respondent because the judgment as to him was reversed and remanded to the District Court for a new trial.

held April 15, 1977. Respondents further alleged that Petitioner's action in terminating their employment, because they had worked for her political opponent, violated their rights to free speech and association under the First and Fourteenth Amendments to the Constitution.

The evidence showed that Petitioner, ANN B. PAINTER, was elected Supervisor of Lyons Township, Cook County, Illinois, on April 5, 1977, and assumed that office on April 18th of that year. (R-199).[3] Respondent, EDWARD NEKOLNY, was a bus driver for the Senior Citizen's Bus Service, earning $10,500.00 per year. (R-512).

PATRICK DUMAS[4] was employed as Senior Citizens' Coordinator at an annual salary of $18,000.00. Respondent, MARIA DUMAS, was employed as a Secretary to DUMAS and Dispatcher for the Senior Citizens Bus Service at $10,000.00 annually. (R-526-539).

Prior to her election as supervisor, Petitioner had promised, as part of her campaign, to abolish four top appointed positions within the Township Government, each paying an annual salary of $18,000.00, one of which positions was held by DUMAS. (R-216) Respondents admit that Petitioner made that pledge. (R-125)

After Petitioner's assumption of her official duties as supervisor, DUMAS failed to appear for work on April 19 and 20. (R-199) Petitioner then informed DUMAS that the position of Senior Citizens Coordinator had been

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[3] The letter "R" herein and hereafter refers to the Report of Proceeding in the Record before the Court of Appeals.

[4] A Plaintiff in the District Court, but not a Respondent; see Footnote 2.

abolished as of April 19, 1977 (R-200, Pl.Ex. 7);[5] thereafter, DUMAS had no further contact with the Township or Petitioner other than the filing of the suit below.

Subsequent to the abolishment of the job of Senior Citizens Coordinator, Petitioner determined that, due to the termination of that position and the proposed discontinuance of many of the reports previously prepared by Respondent DAHMS, her position had become primarily that of dispatcher for the Senior Citizens Bus Service. Upon being advised that DAHMS' workload would be decreased by 40%, Petitioner determined that her salary should be decreased by 20%. Petitioner ordered James Hickey, her liaison to the Senior Citizen Bus Program, to advise DAHMS of that decision. (R-13-14)

Although DAHMS contended that she was forced to quit by the Petitioner, nothing appears in the record to so indicate. The record shows that Petitioner believed that DAHMS would continue her employment, but subsequently received a letter of resignation from her. (R-124 Pl.Ex. 4) Petitioner responded, by letter to DAHMS, expressing regret that DAHMS saw fit to terminate her employment with the Township. (Pl.Ex. 5)

Of the three Plaintiffs in the suit below, NEKOLNY is the only one who was actually dismissed from employment. (R-206) Although NEKOLNY took the position that the dismissal was due to the fact that he worked against the Petitioner politically (R-79-82), Petitioner testified that NEKOLNY'S dismissal was due to concern for his health and his performance as a bus driver charged with the safe transporting of senior and disabled citizens.

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[5] The notation "Pl.Ex." herein and hereafter refers to Plaintiff's Exhibit introduced at trial.

Petitioner testified that she was informed by James Hickey, her liaison to the Senior Citizens Bus Program, that on three occasions NEKOLNY'S wife had reported that NEKOLNY was highly upset and agitated and that she (Mrs. Nekolny) was afraid he might have a heart attack. (R-220) Petitioner testified that Hickey agreed that NEKOLNY appeared to be nervous and agitated and reported that NEKOLNY'S performance was causing strain on other employees. After conferring with the Township Attorney, who advised her that the Township could not continue to employ a person who might possibly have a heart attack or stroke while driving a bus, Petitioner signed a letter of termination prepared by the Township Attorney, and had it delivered to NEKOLNY. (R-222; Pl.Ex. 3)

During the jury instruction conference, Petitioner raised an objection to permitting the jury to impose liability against Petitioner if it found that it was more probably true than not true that termination of the employment of Plaintiffs below was motivated by political considerations. The Petitioner further objected to the instructions which stated that the jury could find for Plaintiffs below, if it found that political considerations were a motivating cause, and not the sole cause, for the terminations or reductions. Petitioner also objected to the Court's shifting the burden of proof from Plaintiffs below to the Petitioner on the *second* issue of whether Plaintiffs below would have been terminated or reduced in the absence of political considerations. (R-384-386) The Trial Court overruled those objections. (R-386-387)

After trial by jury, a verdict was returned against the Petitioner as follows: verdict in favor of Respondent,

NEKOLNY, in the amount of $40,000.00 for lost earnings and fringe benefits, $5,000.00 for mental and emotional stress and $5,000.00 for punitive damages; verdict in favor of Plaintiff, DUMAS[6], in the amount of $12,000.00 for lost earnings and fringe benefits, $1,300.00 additional expenses, $2,500.00 for mental and emotional distress and $5,000.00 for punitive damages; verdict in favor of Respondent, DAHMS, in the amount of $17,500.00 for lost earnings and fringe benefits, $2,500.00 for emotional and mental distress and $5,000.00 for punitive damages.

On March 19, 1980, Plaintiffs were awarded Attorneys' fees in the amount of $9,483.50 and, on April 8, 1980, costs were awarded to Plaintiffs in the sum of $171.16. On May 1, 1980, a judgment order was entered in favor of Respondents. See A-21a.

Upon appeal, the Court of Appeals for the Seventh Circuit ordered the following:

1. Affirmed the verdicts as to Respondents NEKOLNY and DAHMS for lost earnings and fringe benefits.

2. Reversed the whole judgment as to Patrick Dumas and remanded the cause as to him for a new trial.

3. Reversed the judgments for all three as to mental and emotional stress on the grounds that the evidence did not support the award.

The Court of Appeal's opinion sets forth in detail the Petitioner's argument concerning the burden of proof:

> "The Defendant argues that the trial judge incorrectly allocated the burden of proof when he in-

[6] A plaintiff in the District Court, but not a Respondent; see footnote 2.

structed the jury on the issue of Painter's motive for terminating Nekolny, reducing Dahms' salary, and abolishing Dumas' position. The special interrogatory submitted to the jury was in two parts. It first required a finding that

> a motivating factor (in the termination of the respective plaintiff's employment) was the work of plaintiff performed in the campaign of the defendant's opponent and against the defendant. (On *this* question, the *plaintiff* has the burden of proof.)" (emphasis in original.)

The form continued:

> "If your answer to question No. 1 is "Yes" then answer Question No. 2.
> The second question asked whether the defendant would have taken the same action
>
> > even if (the plaintiff) had not worked in McCullom's campgain: (On *this* question, the *Defendant* has the burden of proof). (emphasis in original.)
>
> The special interrogatory thus assigned each Plaintiff the burden of proving that his or her campaign activities were a motivating factor in Painter's action. If the plaintiff succeeded, the burden of proof shifted to the defendant to prove that the defendant would have taken the same action with regard to the plaintiff's employment though he or she had not vampaigned against the defendant." A-5a.

The Court of Appeals then upheld these special interrogatories, citing *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977), as follows:

> "In *Mount Healthy*, the defendant School Board had stated that one of the two reasons for not rehiring the plaintiff was conduct found by the district

court to be 'clearly protected by the First Amendment.' The district court held that because that reason had played a 'substantial part' in the Board's decision, the plaintiff was entitled to reinstatement with back pay. The Court of Appeals affirmed. The Supreme Court vacated the judgment and remanded for a determination made according to what it held to be the proper allocation of the burden of proof:

> 'Initially in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.'

429 U.S. at 287 (footnote omitted.)

The *Mount Healthy* test was used by the trial judge in the instant case. Even plaintiff had the burden of proving that the protected conduct was a 'motivating factor' in the action taken against him before the burden shitfed to the defendant to prove that the termination would have occurred even if that plaintiff had not worked for the election of the defendant's opponent. In our view, that allocation was proper." A. worked for the election of the defendants opponent. In our view, that allocation was proper." A. 6a-7a

ARGUMENT

The effect of adopting the *Mount Healthy* test by the Court of Appeals is to shift both the production burden and the persuasion burden to the Petitioner. That is, the Petitioner is not only required to *produce* evidence that the termination was for legitimate reasons unconnected with the work of the Respondents in the campaign of her opponent, but also to *persuade* the jury of the same. The Court of Appeals placed both the production and persuasion burden on Petitioner without examining the policy implications of doing so.

If the Petitioner is to have any burden with regard to proof, it should be the burden to produce and not to persuade. Such an allocation would not burden legitimate claims of terminations in violation of First Amendment Rights, while it would protect the elected official from vexatious and frivolous litigation. In place of the *Mount Healthy* test, the Petitioner proposes that the test first place the burden upon each Respondent to show that the work in the campaign of the opponent was a "substantial or motivating factor" in the termination. Then, the Petitioner must produce evidence to show that each Respondent would have been terminated, absent the political work for the opponent. Thereafter, the Respondents have the burden of persuading the jury that the reasons advanced for the termination were false and a mere pretext for the real reason, the work for the political opponent. This Court must review the remaining judgments in favor of Respondents NEKOLNY and DAHMS, reverse them, and order a new trial which will use this test as to the burden of proof.

This is precisely the standard set down by this Court in *Texas Department of Community Affairs* v. *Burdine,* 49 U.S.L.W. 4214 (March 4, 1981). Judge Cudahy, in his concurring opinion in the Court of Appeals, noted:

> "As a matter of good policy, however, it is unclear to me why the analysis of *Texas Department of Community Affairs* v. *Burdine,* 49 U.S.L.W. 4214 (March 4, 1981) should not be equally appropriate here. In *Burdine,* a Title VII case, the Court held that the ultimate burden of persuasion 'remains at all time with the plaintiff,' although once the plaintiff has proved a prima facie case of discrimination, the defendant bears the intermediate burden of 'producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.' Id. at 4216." A-18a.

The analysis in *Burdine* should be directly applied to this case, as a matter of good policy. In that case, involving a charge of employment termination based on gender, the District Court found the explanation of the employer sufficient and entered judgment for the employer. The Court of Appeals reversed, finding that the employer did not meet the burden of persuading the District Court that there were legitimate non-discriminatory reasons for the termination and that better qualified persons were hired. This Court, in an opinion by Justice Powell, reversed that judgment of the Court of Appeals, finding that the employer carries the burden of *producing* evidence that the termination was legitimate, but not the burden of *persuasion.*

In arriving at that decision, Justice Powell rendered an analysis that has direct bearing on this case:

> "In *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, (1973), we set forth the basic allocation of

burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.

The nature of the burden, that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. *The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff.* See *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25, n.2 (1979); *id.*, at 29 (Stevens, J. dissenting). See generally 9 Wigmore, Evidence §2489 (3d ed. 1940) (the burden of persuasion 'never shifts'). The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.

The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a proponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters* v. *United States*, 431 U.S. 324, 358 & n. 44 (1977). As the Court explained in

Furnco Construction Co. v. *Waters,* 438 U.S. 567, 577 (1978), the prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. *The defendant need not persuade the court that it was actually motivated by the proffered reasons.* See *Sweeney, supra,* at 25. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, *the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity.* Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

> *The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.* She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas, supra,* at 804-805." *Texas Department of Community Affairs* v. *Burdine, supra,* pp. 4215-4216. (emphasis added)

This same standard should have been given to the jury in this cause. This standard solves the problem posed by Judge Campbell in *Illinois State Employees Union, Council 34, Etc.* v. *Lewis,* 473 F.2d 541, 579 (7th Cir. 1972):

> "*Another vexing and potentially troublesome problem which emerges from our ruling concerns the practical application of the burden of proof standard. It is without saying, of course, that the burden belongs to and remains with the dismissed employee.* It seems equally clear that since a civil service system may not be judicially imposed upon a state or local government, that a public employer cannot be compelled to explain the reasons for termination. Indeed, the imposition of such a 'burden of explanation' would run counter to the precise holding of the Supreme Court in *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Thus, if a public employer desires to stand silent by way of a general denial to the employees' allegations, the employee must demonstrate by *the clear and convincing weight of the evidence that his dismissal resulted solely because of his political associations.* Such a burden is a heavy one but in my view

> is necessitated by the limited nature of the right *Sindermann* compels us to recognize today i.e., the right to be free from summary dismissal only where the dismissal is based *solely* upon a reason expressly proscribed by The First Amendment to the Constitution." (emphasis added)

The decision by this Court in *Mount Healthy, supra,* cannot be controlling as to this matter for several reasons. First of all, it predates the Court's decision in *Burdine.* It involves a public school teacher and not an employee for an elected official. Most importantly, it did not analyze or discuss the distinction between the production burden and the persuasion burden. For those reasons, it should not be applied to this cause.

The *Burdine* standard strikes a proper balance between the concerns for rights under the First Amendment and the concerns that elected officials not be plagued with groundless litigation. The opinion of the Court of Appeals makes light of this concern. At footnote 1, Page 6, the Court of Appeals quotes then-Judge Stevens as follows:

> "If a government department is, in fact, managed on a nonpolitical basis, there is little likelihood that litigation alleging that dismissals were politically motivated would seriously hamper the administration of government . . . The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost.
>
> That cost will loom large only if it is assumed that political considerations will motivate a large number of employment decisions . . . But to the extent employment decisions are based on political con-

> siderations, they involve a factor not normally present in the private sector; the tendency of that factor quite clearly is in the direction of less, rather than more, efficiency. 473 F.2d, at 575."

This position flies in the face of the facts concerning the cupidity and greed of human nature, the litigious nature of the present-day American and the time consuming nature of modern litigation, brought about by discovery practice.

In addition, the Court of Appeals observes:

> "It should also be noted that the plaintiff has the initial burden of proving by a preponderance of the evidence that the protected conduct was a "substantial' or 'motivating' factor. That burden is not insignificant. *A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party or that he favored the defendant's opponent in the election.*" (emphasis added)

The Court of Appeals does not explain why such evidence would not satisfy the burden, *absent any other evidence.* In fact it would, since a plaintiff would have proven his case by a preponderance of the evidence at that point. Once such evidence is placed before the jury, then a defendant has the burden of both producing evidence to show legitimate reasons for the termination and of persuading the jury that these reasons are legitimate and not a pretext, on the basis of the Opinion by the Court of Appeals. This standard is an open invitation to vexatious litigation. It can only be remedied by the application of the *Burdine* standard.

The Respondents argued in the Court of Appeals that the burden of proof, as set forth in *Texas Community Affairs* v. *Burdine, supra,* was met in this case by the jury instructions and interrogatories. Respondents, however, failed to acknowledge that the burden of proof has two aspects, the burden of production and the burden of persuasion. The Trial Court, by stating that Petitioner had the burden of proof with respect to whether there were legitimate reasons for dismissal absent political motivations, also failed to distinguish between the burden of production and persuasion. While a defendant has the burden of producing some evidence, a plaintiff has the burden of persuasion. *Texas Community Affairs* clearly stands for this proposition. To instruct the jury, as the Trial Court did, was to confuse the jury. The instruction should have read that Respondents had the burden of proof, because the ultimate burden of persuading the juror remains on the respondents at all times.

For the foregoing reasons, the Petitioner, Ann B. Painter, individually and as Supervisor of Lyons Township, hereby prays that this Court grant certiorari and review of the Judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 2, 1981

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

No. 80-1731

EDWARD NEKOLNY, PATRICK DUMAS, and MARIA L. DAHMS,

Plaintiffs-Appellees,

vs.

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Defendant-Appellant.

On Petition for Rehearing.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all the of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be and the same is hereby, DENIED.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 80-1731

EDWARD NEKOLNY, PATRICK DUMAS, and MARIA L. DAHMS,

Plaintiffs-Appellees,

vs.

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-518

John F. Grady, *Judge.*

Argued February 19, 1981—Decided July 13, 1981

Before SWYGERT*, *Senior Circuit Judge,* WOOD, and CUDAHY, *Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* This appeal involves the First Amendment rights of three Lyons Township employees who were found by a jury to have lost their jobs because they had campaigned for the Township Supervisor's opponent in an election. The defendant-appellant Supervisor alleges as error the district court's allocation of the burden and standard of proof; the

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* At the time of oral argument, Judge Swygert was a circuit judge in active service; he assumed senior status on July 1, 1981.

directed verdict finding that the Senior Citizens' Coordinator was not a policymaker; the denial of immunity to the defendant in her individual capacity and the denial of qualified immunity; the admission of testimony as to statements made by the defendant's "liaison"; and the award of damages for mental and emotional distress. It is also contended that the verdicts were against the manifest weight of the evidence.

We affirm the judgments of the district court as regards plaintiffs Nekolny and Dahms, except for the damages awarded for mental and emotional distress to all three plaintiffs which are reversed for lack of a sufficient foundation in the record. We also hold that the directed verdict finding plaintiff Dumas not to be a policymaker was error. Accordingly we remand for a determination by the trier of fact according to the standards we have set forth in this opinion.

I

Ann Painter, a Republican and the defendant in this lawsuit, took office as Supervisor of Lyons Township on Aprit 18, 1977. All three plaintiffs were at that time employed by Lyons Township, each having been hired during the term of the previous Supervisor. Plaintiff Edward Nekolny was a bus driver for the Senior Citizens' Bus Service; plaintiff Patrick Dumas was the Senior Citizens' Coordinator, and plaintiff Maria Dahms was a Secretary-Dispatcher. Within six weeks of Painter's incumbency, all three had lost their jobs, although the defendant asserted that Dahms had resigned voluntarily. Each plaintiff had campaigned vigorously for the defendant's opponent, a member of the Bipartisan Party, and against the defendant in the election for Supervisor.

Plaintiffs brought their action under 42 U.S.C. § 1983, alleging that defendant Painter had violated their constitutional rights to freedom of speech and association under the First and Fourteenth Amendments of the United States Constitution by terminating them or

forcing them to resign from their positions with Lyons Township because of their campaign activity on behalf of her political opponent. Defendant took the position that Nekolny was dismissed because of health problems and concern for the safe transporting of senior citizens, that Dumas' position was abolished in keeping with defendant's campaign promise to eliminate the four top-paying appointed positions within the Township government, and that Dahms had voluntarily resigned on being informed that due to a reassessment of program needs, her work load and pay would be decreased. Nekolny and Dahms testified that James Hickey, then defendant's liaison to the Senior Citizens' Bus Service, told them that the defendant wanted to terminate them because they had campaigned against her. Hickey denied making those statements. Although it was not disputed that Painter had made a campaign pledge to abolish four positions including that held by Dumas, it was also clear that after terminating Dumas, Painter named Hickey the new Senior Citizens' Coordinator, albeit at a reduced salary.

A jury trial on the issue of liability resulted in a verdict for the plaintiffs. Damages were assessed by the jury as follows: for Nekolny, $40,000 in lost earnings and fringe benefits, $5,000 for mental and emotional stress and $5,000 for punitive damages; for Dumas, $12,000 in lost earnings and fringe benefits, $13,000 for additional expenses, $2,500 for mental and emotional distress and $5,000 for punitive damages; for Dahms, $17,000 in lost earnings and fringe benefits, $2,500 for emotional and mental distress and $5,000 for punitive damages. This appeal followed.

II

The defendant argues that the trial judge incorrectly allocated the burden of proof when he instructed the jury on the issue of Painter's motive for terminating Nekolny, reducing Dahms' salary, and abolishing Dumas'

position. The special interrogatory submitted to the jury was in two parts. It first required a finding that

> a motivating factor [in the termination of the respective plaintiff's employment] was the work the plaintiff performed in the campaign of the defendant's opponent and against the defendant. (On *this* question, the *Plaintiff* has the burden of proof.)

(emphasis in original.)

The form continued:

> If your answer to question No. 1 is "Yes" then answer question No. 2.

The second question asked whether the defendant would have taken the same action

> even if [the plaintiff] had not worked in McCullom's campaign: (On *this* question, the *Defendant* has the burden of proof).

(emphasis in original.)

The special interrogatory thus assigned each plaintiff the burden of proving that his or her campaign activities were a motivating factor in Painter's action. If the plaintiff succeeded, the burden of proof shifted to the defendant to prove that the defendant would have taken the same action with regard to the plaintiff's employment though he or she had not campaigned against the defendant.

According to the defendant, the proper allocation would have required proof that the sole reason for the defendant's unfavorable action was the campaign activities on behalf of Painter's opponent. Moreover, in the defendant's view the burden of proof should have rested entirely on the plaintiffs. It is argued that such an allocation was made in *Elrod* v. *Burns*, 427 U.S. 347 (1976), in which the Supreme Court held that employees of the Cook County Sheriff's office could not be discharged solely because of their partisan political affiliation. In *Elrod*, however, unlike the instant case, the issue

of the motive for the firings was not disputed. There the defendant conceded that the employees were terminated because they were not Democrats. Thus the Court did not confront the issue of allocating the burden of proof on the motivation issue. Instead the question was whether a complaint alleging firings solely for partisan political reasons stated a First Amendment claim, and the Court held that it did. The similarity between our case and *Elrod* is that in both cases the plaintiffs alleged termination of their employment for political reasons in the context of an election. In our case, however, the defendant hotly contested plaintiffs' allegations that the terminations were political.

Because we are in this case faced with a dispute as to the motive for a termination of employment allegedly for conduct protected by the First Amendment, our case is similar to *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). There a non-tenured teacher was not rehired allegedly for exercising his First Amendment rights. In *Mount Healthy*, the defendant School Board had stated that one of the two reasons for not rehiring the plaintiff was conduct found by the district court to be "clearly protected by the First Amendment." The district court held that because that reason had played a "substantial part" in the Board's decision, the plaintiff was entitled to reinstatement with back pay. The Court of Appeals affirmed. The Supreme Court vacated the judgment and remanded for a determination made according to what it held to be the proper allocation of the burden of proof:

> Initially in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the

> Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287 (footnote omitted).

The *Mount Healthy* test was used by the trial judge in the instant case. Each plaintiff had the burden of proving that the protected conduct was a "motivating factor" in the action taken against him before the burden shifted to the defendant to prove that the termination would have occurred even if that plaintiff had not worked for the election of the defendant's opponent. In our view, that allocation was proper.

We must reject the defendant's suggestion that we adopt a "sole motive" test in the case of terminations of employment after a change of administration following an election. To require that the plaintiff prove that the protected conduct was the "sole motive" for his termination would in our view run the risk of not adequately protecting victims of First Amendment violations. One can scarcely imagine an employee about whom an employer could not find some other dissatisfaction apart from that employee's protected conduct. The claim of a public employee who was terminated in fact for protected conduct could too easily be defeated because his employer asserted a convincing but nonmotivating reason for the discharge. The *Mount Healthy* test allows a defendant to terminate an employee for any legitimate reason, even where, as in *Mount Healthy* itself, a reason violative of the First Amendment was also a substantial or motivating factor in the decision. It should also be noted that the plaintiff has the initial burden of proving by a preponderance of the evidence[1] that the protected

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[1] The defendant contends that the trial court erred when it instructed the jury that plaintiffs' burden was to prove their case by a preponderance of the evidence. Painter relies on Judge Campbell's concurrence in *Illi-*

(Footnote continued on following page)

conduct was a "substantial" or "motivating" factor. That burden is not insignificant. A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the polit-

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[1] (Continued)

nois State Employees Union v. *Lewis*, 473 F.2d 561, 579 (7th Cir. 1972), *cert. denied* 410 U.S. 928 (1973) in which he stated his view that in political discharge cases the burden should remain on the discharged employee to "demonstrate by the clear and convincing weight of the evidence that his dismissal resulted solely because of his political associations."

The *Mount Healthy* decision does not require the plaintiff to prove illegal motivation by clear and convincing evidence and we have already noted that the test there established does not require that the illegal reason be the sole motive. The defendant argues, however, that a proper concern that government officials not be harassed by vexatious lawsuits brought in the context of changes in administration mandates a heavier burden than in other First Amendment discharge cases. We decline to adopt the defendant's suggestion. Rather we agree with then-Judge Stevens who addressed that concern in *Lewis*:

> If a government department is, in fact, managed on a nonpolitical basis, there is little likelihood that litigation alleging that dismissals were politically motivated would seriously hamper the administration of government. . . . The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost.
>
> That cost will loom large only if it is assumed that political considerations will motivate a large number of employment decisions. . . . But to the extent employment decisions are based on political considerations, they involve a factor not normally present in the private sector, the tendency of that factor quite clearly is in the direction of less, rather than more, efficiency.

473 F.2d at 575.

cal card of the opposition party or that he favored the defendant's opponent in the election.

In this case, the evidence showed that James Hickey, the defendant's liaison to the Senior Citizens' Bus Service and later the Senior Citizens' Coordinator, told Nekolny and Dahms that Painter wanted to terminate their employment because they had worked against her election. Plaintiff Dahms testified that Hickey said Dumas was out of a job for the same reason. It was not disputed that Painter had pledged in her campaign to abolish Dumas' job if she was elected. Nevertheless Dumas did not concede that his job was ultimately abolished but argued that it was resurrected in a somewhat altered form for Hickey who had worked in Painter's campaign. Although Hickey's reduced salary is evidence tending to support the defendant's position that Dumas was terminated for reasons having to do with the goals of the new administration, there was sufficient evidence that Dumas was terminated because he campaigned against Painter to allow that issue to go to the jury. We cannot say as a matter of law that there was no violation of Dumas' First Amendment rights.[2]

III

The defendant also challenges the directed verdict entered in favor of plaintiff Dumas on the issue of whether Dumas was a policymaker and thus excepted from the prohibitions of *Elrod* v. *Burns*. Here we agree with the defendant and conclude that the trial judge erred in deciding as a matter of law that Dumas did not occupy a policymaking position.

---

[2] There is no merit to the defendant's contention that the verdicts were against the manifest weight of the evidence. Our review of the record reveals sufficient evidence on which the jury could base its findings. Although much of plaintiffs' evidence was controverted by the defendant, issues of credibility are for the jury to decide. *Hampton* v. *Hanrahan*, 600 F.2d 600, 625 (7th Cir. 1979).

The policymaking exception was discussed by this court in *Illinois State Employees Union* v. *Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). Then-Judge Stevens stated:

> Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policymaking (sic) officials. Moreover, considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions. . . . [J]ustification is a matter of proof or at least argument, directed at particular kinds of jobs.

473 F.2d at 574.

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), Justice Brennan writing for a plurality of the Court, agreed with the *Lewis* distinction between policymaking and nonpolicymaking employees:

> A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. . . . Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. . . . [C]onsideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. Thus, the political loyalty "justification is a matter of proof, or at least argument, directed at particular kinds of jobs." *Illinois State Employees Union* v. *Lewis*, 473 F.2d, at 574. Since, as we have noted, it is the government's burden to demonstrate an overriding

> interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent.

427 U.S. at 367-68.

Recently the Supreme Court, in upholding a determination that assistant public defenders were not policymakers and thus could not be fired for their political beliefs, noted:

> [T]he ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position: rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti v. *Finkel*, 445 U.S. 507, 518 (1980).

The determination of status as a policymaker in many cases presents a difficult factual question. *Rosenthal* v. *Rizzo*, 555 F.2d 390 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977). We are persuaded that the plaintiff has here presented sufficient evidence from which a reasonable juror could conclude that Dumas' position was within the policymaking exception. A narrow definition of who is a policymaker necessarily increases the chances of 'undercut[ting] . . . the implementation of the policies of the new administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367. That ability of the government to implement the will of the people is fundamental to our system of representative democracy. We recognize that policymaking and policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed. The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation.

That standard must be applied to Dumas, the ex-Senior Citizens' Coordinator of Lyons Township. His functions included conducting feasibility studies and other research concerning the nature and extent of programs for senior citizens. His proposals were directed to the Township Supervisor and the Board of Auditors. One program to help temporarily handicapped senior citizens was implemented by the prior administration at Dumas' recommendation and was abolished when Painter was elected Supervisor. Dumas was one of the four highest paid employees in the Township, tending to signify a position of some influence. That he did not have final decisionmaking authority is not determinative. *See Indiana State Employers Assoc., Inc.* v. *Negley*, 365 F. Supp. 225 (S.D. Ind. 1973), *aff'd*, 501 F.2d 1239 (7th Cir. 1974). There was, in short, evidence from which a reasonable juror could conclude that the Senior Citizens' Coordinator had meaningful input into decisionmaking concerning the nature and scope of a major township program. Therefore it was for the trier of fact to determine whether Dumas was a policymaker. The district court erred in directing a verdict on that issue.

IV

The defendant next argues that she is immune from liability individually and is liable, if at all, only in her official capacity. The plaintiffs sued Painter both individually and as Supervisor of Lyons Township. Official-capacity suits, the Supreme Court has stated, "generally represent only another way of pleading an action against an entity of which an officer is an agent. . . ." *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978). In *Monell* the Court, overruling *Monroe* v. *Pape*, 365 U.S. 167 (1961), held that local governments were "persons" and thus suable under § 1983. Damages sought from government officers in their official capacity had before *Monell* often been barred as "subterfuges that contravene the exemption from § 1983 announced in *Monroe* [for municipalities]."

Muzquiz v. *City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (en banc) (adopting in pertinent part 520 F.2d 1002, 1009 (Godbold, J., dissenting)); *see generally* Nahmod, Civil Rights & Civil Liberties Litigation at §6.04.

Here plaintiffs sued Painter individually in order to be able to collect damages from Painter herself and thus establish that Township funds were not their only source of relief. Now that *Monell* allows municipalities to be sued in their own name, recovery from the public treasury is possible in cases of government officials being sued in their official capacity. Defendant incorrectly leaps to the conclusion, however, that therefore only an official capacity and not an individual suit is appropriate here. We see no reason to assume on the basis of *Monell* that the law of individual liability has changed. We are unpersuaded that the district court should have immunized Painter from individual liability in this action.

Painter also contends that the trial judge erroneously failed to grant her qualified immunity. We do not agree. To be entitled to the special exemption from § 1983 liability provided by the doctrine of qualified immunity, Painter

> must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of [her employees]

Wood v. *Strickland*, 420 U.S. 308, 322 (1975).

She is not immune from liability if she

> knew or reasonable should have known that the action [she] took within [her] sphere of official responsibility would violate the constitutional rights of [those] affected, or if [she] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff].

Id.

Without reaching the issue of her subjective intent we conclude that the trial judge properly determined that Painter knew or should have known that her actions were constitutionally infirm. The jury found that the termination of each plaintiff's employment was politically motivated, in violation of that plaintiff's First Amendment rights. It is clear that the law was not unsettled on this point. In *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Supreme Court had expressly forbidden political firings following an election, and in *Mount Healthy City School District Board of Education* v. *Doyle*, 329 U.S. 274 (1977), the Court held that the presence of both permissible and impermissible motives did not legalize a termination that would not have occurred but for the existence of conduct protected by the First Amendment. Qualified immunity was not available to the defendant here.

V

The defendant alleges that the trial court erred in admitting testimony as to statements allegedly made by James Hickey concerning the defendant's state of mind.[3] Testimony as to Hickey's statements was allowed as admissions against the defendant by her agent. Painter argues that those statements should not have been ad-

[3] Plaintiff Nekolny testified that Hickey told him, "You know I tried to talk to Ann Painter. I tried to save your job for you, but the way you and your wife worked in the campaign I can't do anything with Ann Painter. You are being fired." Plaintiff Dahms also testified to hearing Hickey make those statements. Moreover, in a separate meeting with Hickey, Dahms testified that Hickey said "Mrs. Painter was very upset with all of us. She was a very vindictive person and was set on cleaning house and getting rid of everyone that campaigned against her." Dahms also testified that Hickey said he was Painter's "personal hatchet man," that Hickey suggested Dahms was also "going" for campaigning against Painter, and stated that Painter had not "figured out how she was going to get rid of me yet."

mitted becaues Hickey did not have authority to say either what he did or anything else concerning the plaintiffs' employment.

Admissibility in this instance is controlled by Rule 801(d)(2)(D) of the Federal Rules of Evidence, which provides:

> A statement is not hearsay if . . . [it] is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . .

We cannot say that the trial judge erred in concluding that Hickey was Painter's agent and that his statements concerned "a matter within the scope of his agency or employment." Rule 801(d)(2)(C), unlike 801(d)(2)(D), requires that a statement be "by a person authorized by him to make a statement concerning the subject." Rule 801(d)(2)(D), however, says nothing about an agent, having authority to make a statement on a particular subject. After the fact of the agency is established, Rule 801(d)(2)(D) requires only that the statement "concern a matter within the scope of [the] agency or employment." *Northern Oil Co., Inc.* v. *Socony Motor Oil Co., Inc.*, 347 F.2d 81 (2d Cir. 1965), cited by the defendant for the proposition that the agent must have authority to make statements in a given area, was decided before the enactment of Rule 801(d)(2)(D). In fact, *Northern Oil* was referred to in the Advisory Committee Notes to Rule 801(d)(2)(D) as an example of the older and more narrow view not favored by the Committee. Notes of Advisory Committee on Proposed Rules (*reprinted in* Fed. Rules Evid. Rule 801, 28 U.S.C.A.). Rule 801(d)(2)(D) takes the broader view that an agent or servant who speaks on any matter within the scope of his agency or employment during the existence of that relationship, is unlikely to make statements damaging to his principal or employer unless those statements are true.

Here Painter herself testified that Hickey was her "liaison" and "advisor" to the senior citizens program in which all three plaintiffs were employed. Painter acknowledged that she met with Hickey "almost every day." Painter stated that she and Hickey had interviewed Dahms for the job, that she and Hickey had discussed Dahms' work, that Hickey had recommended to her that Dahms' work load be reduced, and that she had directed Hickey to communicate news of the reduction to Dahms. Hickey, who had previously investigated and reported to Painter on Nekolny's health and job performance, was charged by Painter with delivery of the letter terminating his employment as well. Painter also conceded that she herself had had almost no contact with any of the plaintiffs. In her brief, Painter argues that an agency cannot be established by the statements of the agent alone. In this case, however, the principal's own testimony establishes the fact and the scope of the agency relationship sufficiently to make the disputed statements admissible.[4]

It is clear to us, as it was to the plaintiffs, that Hickey was speaking of a matter within the scope of his agency or employment when he discussed with Dahms and Nekolny the reasons for the decisions concerning their employment.

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[4] Although we need not rely on Hickey's testimony, we note that the

> broadly stated proposition that the authority of an agent cannot be proved "out of the mouth of the agent" is true only if it is considered with its numerous exceptions. . . . For example, when made in court under oath, subject to the tests of cross examination and penalties of perjury, those circumstances are regarded as making the statement sufficiently trustworthy to be received.

Murphy Auto Parts Co. v. *Ball*, 249 F.2d 508, 510 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 932 (1958). Hickey's testimony about his job responsibilities and the testimony of the plaintiffs reinforce our conclusion.

VI

Finally, the defendant argues for reversal on the damages awarded for emotional and mental distress. We agree that there was insufficient evidence of injury to support the award.

Although mental and emotional distress caused by the denial of First Amendment rights is compensable, an award of damages for such injury will not stand without proof that such injury actually was caused. *See Carey* v. *Piphus* 435 U.S. 247, 264 (1978); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The only evidence of injury contained in this record was Nekolny's testimony that on learning he was terminated he was "very depressed," Dahms' statement that she was at one point subsequent to leaving her job "a little despondent and [lacking] motivation," and Dumas' testimony, on being asked whether he looked for employment after losing his job, "Well, I didn't work for six weeks, I was completely humiliated, and I stayed close to home."

That evidence is insufficient to constitute proof of compensable mental or emotional injury.

> Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury.

Carey v. *Piphus*, 435 U.S. at 264 n.20 (citation omitted).

A single statement by a party that he was "depressed," "a little despondent," or even "completely humiliated" (the latter in the context of explaining why other employment was not sought), is not enough to establish injury even when the statement is considered along with the facts of this case. The circumstances here do not approach the egregiousness of those found in *Seaton* v. *Sky Realty Company, Inc.*, 491 F.2d 634 (7th Cir. 1974).

Although at one point the trial judge decided that he would not permit evidence on the issue of emotional injury, plaintiffs' counsel did not make an offer of proof according to Federal Rule of Evidence 103(a)(2). Moreover, counsel did not offer to present further evidence when the judge later reversed his position and decided to allow the jury to award damages on this issue. According to the record presented here, plaintiffs were not entitled to damages for emotional injury and the award of those damages must be reversed.

VII

The judgments in favor of Nekolny and Dahms are affirmed except for that portion of the damage award attributable to mental and emotional distress. Because a directed verdict was erroneously entered on the issue of whether plaintiff Dumas was a policymaker, we vacate the judgment and remand for a determination on that issue by the trier of fact. In the event Dumas is found not to be a policymaker, he is entitled to all damages except those attributable to mental and emotional distress.

CUDAHY, *Circuit Judge*, concurring:

I agree that *Mount Healthy* compels us to shift the burden of persuasion to the defendant once the plaintiffs have made a prima facie showing that political activity was a "motivating factor" in the discharges. As a matter of good policy, however, it is unclear to me why the analysis of *Texas Department of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214 (March 4, 1981) should not be equally appropriate here. In *Burdine*, a Title VII case, the Court held that the ultimate burden of persuasion "remains at all time with the plaintiff," although once the plaintiff has proved a prima facie case of discrimination, the defendant bears the intermediate burden of "producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 4216.

Although it is a leading decision involving the First Amendment rights of government employees, *Mount Healthy* did not address allegedly partisan political terminations in the framework of an election, where the reasonable prerogatives of the candidates returned by the voters must be weighed in the balance. In addition, successful candidates may be assigned the ultimate burden of proving the propriety of wholly meritorious firings. While the result in the case before us does not seem inappropriate, I am concerned that, in the context of allegedly partisan discharges of defeated campaigners, the broad sweep of the *Mount Healthy* analysis may create undesirable pitfalls for successful candidates.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 14, 1981

Before

Hon. Luther M. Swygert, Senior Circuit Judge

No. 80-1731

EDWARD NEKOLNY, PATRICK DUMAS and MARIA L. DAHMS,

Plaintiffs-Appellees,

vs.

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 518

Judge John F. Grady

This court orders, sua sponte, that the second sentence of the last paragraph on page 9 of this court's opinion is hereby amended to read:

"We are persuaded that the defendant has here presented sufficient evidence from which a reasonable juror could conclude that Dumas' position was within the policy-making exception."

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 518

EDWARD NEKOLNY, et al.,

Plaintiffs,

vs.

ANN B. PAINTER,

Defendant.

JUDGMENT ORDER

This action came on for trial before the court and a jury, Honorable John Grady presiding, and the issues having been duly tried, and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED;

That the Plaintiff, Patrick Dumas, recover of the Defendant, Ann B. Painter, individually and as Supervisor of Lyons Township, the sum of $20,800 with interest thereon as provided by law;

That the Plaintiff, Edward Nekolny, recover of the Defendant, Ann B. Painter, individually and as Supervisor of Lyons Township, the sum of $50,000 with interest thereon as provided by law;

That the Plaintiff, Maria Dahms, recover of the Defendant, Ann B. Painter, individually and as Supervisor of Lyons Township, the sum of $25,000 with interest thereon as provided by law;

That the Plaintiffs are entitled to attorney's fees in the amount of $9,483.50.

That the Plaintiffs are awarded the amount of $171.16 as costs.

/s/ John Grady
JUDGE

DATE
May 1, 1980

Opposition

Office - Supreme Court, U.S.
FILED
FEB 24 1982
ALEXANDER L. STEVAS,
CLERK

81-1436

No.

In the
Supreme Court of the United States
October Term, 1981

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Petitioner,

vs.

EDWARD NEKOLNY and MARIA L. DAHMS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Whether the trial judge properly instructed the jury as to the burden of proof that each party bears in a civil rights case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Petitioner,

vs.

EDWARD NEKOLNY and MARIA L. DAHMS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONDENTS' BRIEF

DECISIONS BELOW

The Petition adequately identifies the decisions below.

JURISDICTIONAL STATEMENT

The jurisdiction requisites involved are properly set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Petitioner's brief sets forth the Constitutional Provisions involved herein.

42 U.S.C. Sec. 1983 — Civil Action for Deprivation of Rights:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner's statement of facts is notable for its omission of evidence contrary to her position. It is not a statement of the case as determined by the jury.

In April 1977, Lyons Township conducted an election for township offices, including supervisor. The three candidates for supervisor and their respective parties were Petitioner Ann Painter, GOP Party; Walter "Terry" McCollom, BiPartisan Party; and Twyla Warden, was sponsored by the Democratic Township Committeeman (R-76, 175). Petitioner Painter was victorious. Immediately after taking office, she named James Hickey as her "liaison" to the senior citizens transportation program where all three of the Respondents worked. (R-209, 418) Hickey was characterized as Petitioner Painter's personal "hatchet man." (R-110, Ill.)

All three of the Respondents campaigned vigorously for Terry McCollom and against Petitioner Painter. (R-77,

238) Their activities were well known. All three rang doorbells, made telephone calls, and in general asked people to vote for McCollom. All three lost their jobs within six weeks after Petitioner Painter assumed office. (R-82, 83, 113, 116, 238, 239) In November 1978, Petitioner Painter was interviewed by the Suburban Trib. Petitioner Painter stated that:

> I imagine that I have left many enemies in the wake of things . . . Politically, there was a little war here. I am Republican and most of the people who were repositioned here or let go were Democrats from the previous administration. (R-204)

Nekolny Facts

As to Respondent Nekolny, about one month after Petitioner assumed office he was told by Mr. James Hickey, his boss and Petitioner's "liaison" to the Senior Citizens Transportation Program (R-79,209,418)

> "You know, I tried to talk to Ann Painter. I tried to save your job for you, but the way you and your wife worked in the campaign I can't do anything with Ann Painter. You are being fired." (R-82).

In May 1977 Petitioner claimed in her letter to Respondent Nekolny that she terminated him for "several incidents where your attitude and mode of performance over a long period of time is not what is expected of an employee in such a position." (R-83). Then at trial Petitioner testified the reason for his termination was his poor health. (R-227). At no time was there any evidence introduced regarding Mr. Nekolny's poor health or what incidents she was referring to in her letter.

Respondent Nekolny was replaced by William Turner who had worked in Petitioner's campaign.

Dahms Facts

Respondent Dahms had worked for Lyons Township since the fall of 1975. (R-103) After the election, Dahms was absent from work for the period April 5, 1977 to April 25, 1977. (R-197) On April 25, 1977, Dahms and James Hickey met at the office in Summit. During this meeting James Hickey stated that "Mrs. Painter was very upset with all of us. She was a very vindictive person and was set on cleaning house and getting rid of everyone that campaigned against her." (R-108)

On May 3, 1977, Respondent Dahms and James Hickey had lunch. Dahms testified to Hickey's statements:

> . . . He was very apologetic to what was happening to Mr. Nekolny that he had to do that and what I remember most of that conversation was him saying I didn't realize I was going to be Ann Painter's *personal hatchet man.* I really don't like doing this and I don't like what I have to do. This was his instructions.
>
> It was during this time I was told also that they had not figured that this was why Mr. Dumas was going also. He didn't know, he wanted to know what I had done, what active part I had taken in the campaign, et cetera.
>
> He says he didn't know if—how she was—she hadn't figured out how she was going to get rid of me yet. (R-110, 111, my emphasi)

Petitioner ordered Hickey to give Dahms a 20% cut in pay from $10,000 per year to $8,000 per year (R-213). Dahms was told by Hickey that her pay was going to be reduced because monthly and annual reports were going to be eliminated. However, the evidence established that Dahms had no involvement in the yearly reports and spent two to three hours at most per month on the

monthly reports. (R-116). Respondent Dahms further testified that her job responsibility never changed nor was it decreased after Petitioner Painter took office. (R-117,124,140). Because of this unjustified cut in pay she was forced to resign.

Respondent Dahms was replaced by Laura Dering, a member of Painter's political party whose boyfriend had worked in Petitioner's campaign. (R-121,122).

Dumas Facts

Petitioner terminated Respondent Dumas the day after she took office, (R-238, 239) Though she claims to have abolished Dumas' position, the evidence, however, showed that she did not. (R-199, 200) Respondent Dumas was replaced by James Hickey who performed the same duties as Dumas only under a different title. (R-333, 212, 213, 349-50, 413, 416) James Hickey had worked for Petitioner in her campaign. (R-334-5)

Seventh Circuit Decision

Upon appeal, the Court of Appeals for the Seventh Circuit:

1. Affirmed the verdicts as to Respondents NEKOLNY and DAHMS for lost earnings and fringe benefits, and punitive damages;

2. Reversed the judgment as to Patrick Dumas and remanded the cause as to him for a new trial *only* on the issue of whether he was a policy maker.

3. Reversed the judgments for all three as to mental and emotional stress on the grounds that the evidence did not support the award. (*Nekolny et al* v. *Painter*, (1981) see appendix to Petitioner's brief pp. 2a to 19a)

REASONS FOR DENYING THE WRIT

The tests for whether a Petition for a Writ of Certiorari is to be granted are as follows:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.
> (Rules of the Supreme Court of the United States, Rule 17)

This case meets none of these tests.

The underlying assumptions in Petitioner's brief are that this Court's decision in *Texas Department of Community Affairs v. Burdine,* 49 USLW 4214 (March 4, 1981), is inconsistent with *Mount Healthy v. Doyle* 429 U.S. 274, 50 L.Ed.2d. 471, 97 S.Ct. 568 (1978) and that the Seventh Circuit's decision in this case ignores *Burdine* in relying on *Mount Healthy.* Petitioner argues that this Court should overrule or worse, ignore, its decision in *Mount Healthy v. Doyle, supra.*

We shall demonstrate that both the Seventh Circuit and the trial judge relied properly on *Mount Healthy* in allocating the burden of proof and that neither ignored the *Burdine* case. Both were followed.

ARGUMENT

In *Burdine*, this Court discussed the burden of proof issue in a Title VII discrimination case when the defendant denies that his *motivation* for failing to promote an employee *was for impermissible reasons.* The Court had earlier discussed the burden of proof[1] in such a case in the leading case on this issue—*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), followed in *Sweeney* v. *Board of Trustees of Keene State College*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978).[2] Nothing new was decided in *Burdine*:

> This case requires us to address *again* the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 USC 2000 e, *et seq.* (*Burdine*, at 4215; *my emphasis*)

In each of the *McDonnell* line of cases, the employer *denied* he was motivated in his decision to terminate, failure to promote, or not to hire the plaintiff by impermissible reasons. The issue addressed by the court was whether the employer had the burden of proving that impermissible reasons were not a motivating factor in his decision. This Court said no, the employer does not have such a burden, because the Plaintiff then would not have to prove the affirmative of his case—that the employer was motivated by impermissible reasons.

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[1] The phrase burden of proof means for purposes of this brief both the burden of production *and* the burden of persuasion.

[2] *McDonnell Douglas*, *Sweeney* and *Burdine* will hereafter be referred to as the *McDonnell line* of cases.

In *Mount Healthy, supra,* the Court decided who has the burden of proof when the employer claims he has legitimate reasons for termination *even if the protected conduct was a substantial or motivating factor in the employee's termination.*

This Court stated in *Mount Healthy, supra*:

> We are thus brought to the issue whether, even if that were the case [that the employee would have been terminated in any event] the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not. (*Mount Healthy,* at 50 L.Ed2d at 482)

Thus in *Mount Healthy* the Court did in fact decide that even though an impermissible reason was a substantial, or motivating, factor in the employer's decision, the employer can still escape liability by proving that he would have taken the same action in any event. The key factor ignored by Petitioner in her argument is that this issue was never addressed in the *McDonnell* line of cases, *supra,* p. 3. Those cases are not therefore in conflict with *Mount Healthy.*

McDonnell and *Mount Healthy* give the employer two defenses in cases involving termination of (or failure to promote or hire) an employee for allegedly impermissible reasons.

First, the employer can simply deny that his actions were motivated by impermissible reasons. Here, the burden of proof, or persuasion, *always rests with the Plaintiff.* That's the *McDonnell* line of cases.

Second, the employer can defend by proving that even though he was at the time motivated by impermissible reasons, he would have reached the same conclusion, and hence taken the same action, in any event. That is *Mount Healthy, supra.*

In either type of case the burden of proof, or persuasion, is on the plaintiff at all times to prove that impermissible reasons were a motivating factor in the employer's decision. That is the teaching of *McDonnell.* But once this has been proven, and the employer raises the defense that he would have taken the same action in any event, the burden of proof then shifts to the employer to prove this proposition. This is the *Mount Healthy* teaching.

In other words, in this case the trial judge and Seventh Circuit correctly followed the law of both *McDonnell* and *Mount Healthy.*

The test of the *McDonnell* line of cases was fulfilled by the first interrogatory presented to the jury here—

> was a motivating factor [in the termination of the respective plaintiff's employment] the work the plaintiff performed in the campaign of the defendant's opponent and against the defendant (on this question, the *Plaintiff* has the burden of proof.)

By so instructing the jury, the trial judge at all times kept the burden of persuasion on the Respondents to prove that a motivating factor in Petitioner's decision was the exercise of their First Amendment rights. On this issue the Petitioner had no burden of proof (persuasion). This is in accordance with *McDonnell, supra,* and *Burdine, supra.*

The jury's affirmative answer to this question for all three Respondent's would under the *McDonnell* line of cases

entitle the Respondents to a judgment in their favor. (See also *Loeb* v. *Textron,* 600 F2d 1003, 1018 (1st Cir. 1979), wherein the court indicated use of one instruction or interrogatory, such as the above question used in this case, may be appropriate.) Indeed the jury's affirmative answer to the trial judge's instruction could have ended the case. The Respondents had proven all they needed to in order to recover.

Petitioner, however, had raised another defense—the *Mount Healthy* question—by arguing that even if impermissible reasons were a motivating factor in her decision she would have taken the same action in any event. Thus the trial judge under *Mount Healthy* was required to propound the second instruction, or question, which was whether the Petitioner would have taken the same action

> . . . even if [the Respondent] had not worked in McCullom's campaign. (On *this* question, the *defendant* has the burden of proof)

And *Mount Healthy* clearly states that Petitioner carries the burden of persuasion on this issue. Thus the trial judge's instruction was correct, as was the Appellate Court's affirmation of this action.

Petitioner also argues that *Mount Healthy, supra,* is not controlling because it predates the court's decision in *Burdine.* As noted earlier, the Supreme Court itself stated that it decided nothing new in *Burdine.* The Court was merely following the *McDonnell Douglas, supra,* holding which was decided in 1973 five years prior to it's *Mount Healthy, supra,* decision in 1978.

Petitioner also argues that *Mount Healthy* involved a public school teacher and not an employee of an elected official. But Petitioner does not give one reason why this

distinction is important. More suprising is that in *McDonnell Douglas,* the leading case upon which *Burdine* relies which in turn is the cornerstone of Petitioner's entire argument does not involve a public official, as an employer, at all.

CONCLUSION

In brief, the jury in this case was properly instructed under both *Burdine* and *Mount Healthy.* Petitioner's argument ignores the defense provided under the court's ruling in *Mount Healthy.*

Based on the above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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